

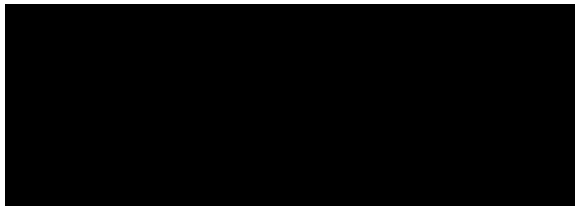
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U.S. Department of Homeland Security
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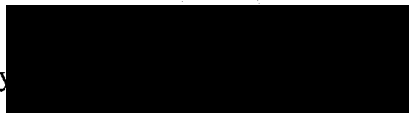


**U.S. Citizenship
and Immigration
Services**



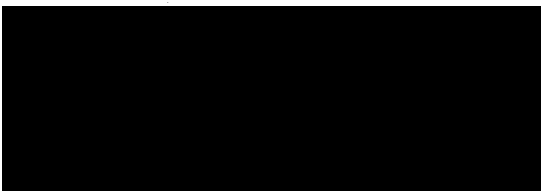
FILE: SRC 03 181 55341 Office: TEXAS SERVICE CENTER Date: **MAR 10 2004**

IN RE: Petitioner:
Beneficiary:



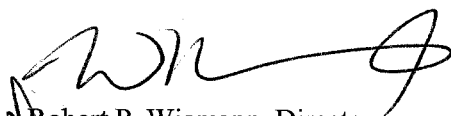
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner [REDACTED] states that it is wholly-owned subsidiary of a French business, IFA S.A.R.L. The petitioner imports and exports fine rugs. The U.S. entity was incorporated in the State of Georgia on July 17, 2000. In August 2001, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager. CIS approved the petition as valid from September 26, 2001 to September 26, 2002 to allow the petitioner to open a new office. On June 28, 2003, the petitioner requested an extension of the petition's validity and the beneficiary's stay for two years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's president and chief executive officer at an annual salary of \$60,000. On September 15, 2000, the director denied the petition because the beneficiary did not qualify as a manager or an executive.

On appeal, petitioner's counsel asserts that the beneficiary serves in a primarily managerial or executive capacity. Additionally, counsel reiterates its prior request that CIS approve the June 28, 2003 petition retroactively to September 26, 2002.

Initially, the AAO will address the issue of whether the petition may be retroactively approved to September 26, 2002. In relevant part, the regulation at 8 C.F.R. § 214.1(c)(4) states:

Timely filing and maintenance of status. An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of [CIS] and without separate application, with any extension granted from date the previously demonstrated at the time for filing that:

- (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and [CIS] finds the delay commensurate with the circumstances

The petitioner filed a petition to extend stay on September 25, 2002. The petitioner states that its prior counsel, Alec Papadakis, recommended withdrawal of that petition. Consequently, the petitioner submitted a motion to withdraw the petition. On February 28, 2003, the director granted the motion to withdraw. On June 13, 2003, the petitioner obtained new counsel. On June 28, 2003, the petitioner filed the instant petition to extend stay. The petitioner asserts that reliance upon Alec Papadakis's inaccurate advice qualifies as "extraordinary circumstances" as defined in the regulation above. Therefore, CIS should grant the instant petition retroactively to September 26, 2002.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with

respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The AAO notes that on May 27, 2003 the beneficiary filed a notarized grievance with the State Bar of Georgia. The grievance detailed the agreement the petitioner established with Alec Papadakis, what actions the former counsel allegedly failed to take, and what errors the former counsel purportedly committed. The record, however, presents no evidence demonstrating that Alec Papadakis was informed of the allegations leveled against him or was given an opportunity to respond. Therefore, the record cannot establish *prima facie* evidence of ineffective counsel or the extraordinary circumstances necessary to excuse the filing of this petition nine months after the expiration of the beneficiary's stay.

Furthermore, the AAO notes that the United States entity withdrew the previous petition after the director observed that the petitioning company was not actively doing business and requested additional evidence on this issue. To grant the current petition retroactively at this time would, in effect, allow the petitioner an additional nine months to start the new business, contrary to the one-year period allowed under the regulations. *See* 8 C.F.R. § 214.2(l)(14)(ii)(B).

The AAO now turns to the issue of whether the beneficiary will primarily work as an executive or manager. To establish L-1 eligibility under section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

Initially, the AAO will address the issue of whether the beneficiary's proposed duties for the United States entity will be executive and managerial. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and

- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are *either* in an executive *or* managerial capacity. *Id.* Counsel's brief asserts that the beneficiary will be serving as a manager and an executive; therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

In this instance, the petitioner provided four essentially similar descriptions of the beneficiary's proposed duties in the United States. These descriptions appear on Form I-129, in a June 16, 2003 letter submitted in support of Form I-129, in a September 11, 2003 letter submitted in response to the director's June 25, 2003 request for evidence, and in counsel's brief on appeal. The September 11, 2003 letter provides a representative and comprehensive summary of the proposed duties:

[The beneficiary] is the President and Chief Operating Officer of [the U.S. entity]. As such he is responsible for overseeing all aspects of the growing U.S. operations. This will consume 100% of his time. Specifically, he has been responsible for:

- surveying potential markets (consuming 25% of time);
- developing relationships with U.S. companies and potential customers to promote sales (consuming 25% of time);
- investigating and establishing links with buyers from U.S. companies (consuming 15% of time);
- hiring and training all personnel for sales and marketing positions (consuming 5% of time);
- identifying potential clients and promoting business relationships (consuming 15% of time); and
- being responsible for all communications and coordination of efforts between [the petitioner and the foreign entity] (consuming 15% of time).

(Bullets added.) The September 11, 2003 letter added, "[The beneficiary] has used his over nine years of high level managerial experience in the rug industry to promote and grow the U.S. operations of [the French entity]. [The beneficiary] will supervise all employees [of the petitioner]."

The job duties depicted above present the beneficiary as devoting approximately 80 percent of his time to marketing. Specifically, he will spend 25 percent of his time "surveying potential markets," 25 percent of his time "developing relationships with U.S. companies and potential customers to promote sales," 15 percent of

his time “investigating and establishing links with buyers from U.S. companies,” and 15 percent of his time “identifying potential clients and promoting business relationships.” Marketing duties, by definition, qualify as performing tasks necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). These duties listed above establish, therefore, that the beneficiary will not be performing primarily managerial or executive duties.

Additionally, the claimed duties are too broad and nonspecific to convey an understanding of the beneficiary’s daily activities. For instance, the petitioner characterized the beneficiary’s potential tasks as “promot[ing] and grow[ing] the U.S. operations,” “surveying potential markets,” “developing relationships with . . . potential customers,” “investigating and establishing links with buyers,” “identifying potential clients and promoting business relationships,” and being “responsible for all communications and coordination of efforts” between the petitioner and overseas entity. The petitioner did not define or quantify the “relationships,” “potential customers,” “links,” “communications,” or “coordination of efforts” that the beneficiary will pursue. Moreover, the petitioner supplied no quantifiable definitions for “promot[ing],” “grow[ing],” “developing,” “investigating,” “establishing,” and “identifying.” The AAO further notes that the petitioner generally paraphrased the statutory definitions of “managerial” and “executive” capacity. See sections 101(a)(44)(A)(i), (iv) and 101(a)(44)(B)(iii) of the Act.

Although counsel claims that the petitioner has one contractual employee, the petitioner has neither presented evidence to document the existence of this employee nor identified the service this individual provides. Additionally, the petitioner has not explained how the services of the contracted employee obviate the need for the beneficiary to primarily conduct the petitioner’s business. Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus, the record lacks adequate supporting documentary evidence to define the beneficiary’s duties as primarily executive or managerial.

Furthermore, the petition presents another deficiency regarding the beneficiary’s duties as a personnel manager; specifically, the U.S. entity has not demonstrated that the beneficiary will primarily supervise a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. See section 101(a)(44)(A)(ii) of the Act. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, “[T]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” The term “profession” contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

The petitioner’s June 16, 2003 letter depicted the U.S. organization as planning to employ three persons in addition to the beneficiary: (1) a vice president of sales; (2) a chief financial officer; and a (3) a secretary. In contrast, the September 11, 2003 letter stated that the petitioner employs four persons in addition to the

beneficiary: (1) Nasser Jallali, vice president of sales; (2) Elizabeth Melendez, a salesperson; (3) Kwame Lee, a warehouse supervisor; and (4) Laticia Bautista, a secretary. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988). The discrepancy in the number of claimed employees, therefore, detracts from the petitioner's credibility.

The September 11, 2003 letter further states that Nasser Jallali began working for the petitioner in May 2003, while Elizabeth Melendez, Kwame Lee, and Laticia Bautista began working for the petitioner in September 2003. Additionally the September 11, 2003 letter claims that the petitioner employs Craig Kiefer as a contractor. The petitioner submitted an August 14, 2003 Internal Revenue Service Form W-9 Request for Taxpayer Identification Number and Certification and two sales commission checks dated August 5 and 29, 2003 to verify Craig Kiefer's status as a contractor. The United States entity, however, filed the instant visa petition on June 18, 2003. CIS may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Given that the petitioner hired Elizabeth Melendez, Kwame Lee, and Laticia Bautista and contracted with Craig Kiefer after June 18, 2003, these four employees' responsibilities have no bearing on whether the beneficiary's proposed duties qualify as primarily managerial.

In turn, only Nasser Jallali's duties are relevant to whether the beneficiary's proposed duties qualify as primarily managerial. The September 11, 2003 letter described Nasser Jallali's duties:

Mr. Jallali is responsible for directing and coordinating activities relating with the development of business relations and sales. Mr. Jallali works closely with the President to formulate policies and developing [sic] short [and] long range goals and objectives. He performs the day-to-[]day operations of contacting current and potential client[s] and developing relationships so as to promote sales for the company. He serves under the President of the company. His activities and work will be closely supervised by the President.

Despite his title of vice president of sales, Nasser Jallali does not supervise any employees. Moreover, Nasser Jallali's duties appear to be very similar to the beneficiary's proposed responsibilities. In particular, the vice president appears to devote much of his time to marketing; that is, he develops business relations and sales, contacts current and potential clients, and promotes sales for the company. As explained earlier, marketing duties qualify as performing tasks necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, *supra*.

Furthermore, the vice president's tasks are – like the beneficiary's – vaguely worded. For example, the petitioner characterized Mr. Jallali as “directing and coordinating activities,” “formulat[ing] policies and developing short [and] long range goals and objectives,” and “contacting current and potential client[s].” The petitioner failed to define or quantify “directing,” “coordinating,” “formulat[ing],” “developing,” and “contacting.” Similarly, the petitioner identifies no specific policies, goals, objectives, or clients. As stated previously, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, *supra*. Thus, the

record lacks adequate supporting documentary evidence to demonstrate that the vice president can relieve the beneficiary from performing nonqualifying duties.

In sum, the beneficiary's marketing duties, vaguely defined responsibilities, and supervision of a non-professional, non-managerial employee as well as inconsistent evidence preclude CIS from classifying the beneficiary as a manager or executive.

Upon review, at the time of filing, the petitioner did not appear to have been actively doing business or to have had sufficient organizational structure to support a management or executive position. The petitioner indicated that it plans to hire additional managers and employees in the future. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.